United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

77-1116

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

UNITED STATES OF AMERICA,

Appellee,

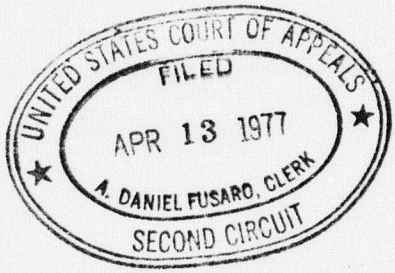
- v. -

JOHN McCLEAN and RAMON VIERA,

Appellants.

----------X

BRIEF AND APPENDIX FOR APPELLANTS



Patrick M. Wall
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New York, New York 10036
(212) 986-6688

Counsel to Appellants

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

UNITED STATES OF AMERICA,

Appellee,

- v. -

JOHN McCLEAN and RAMON VIERA,

Appellants.

----------X

BRIEF FOR APPELLANTS

Preliminary Statement

This is an appeal from an order entered in the United States District Court for the Eastern District of New York (Weinstein, J.) on January 31, 1977 (A1).[1] That order denied Appellants' motion for reconsideration of the District Court's prior ruling on a timely-filed motion for a reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure and, upon such reconsideration, for a further reduction in sentence. The District Court, never reaching the merits, denied the motion solely upon the ground

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1. Unless otherwise noted, all parenthetical references herein are to the Appendix which follows this brief. Page citations to that Appendix are preceded by the letter A.

that it lacked the power to entertain it.

Statement of Facts

Appellants, after a jury trial before Hon. Jack B. Weinstein in the United States District Court for the Eastern District of New York, were convicted of conspiracy (18 U.S.C. §371), various violations of the federal Civil Rights Act (18 U.S.C. §242) and various violations of the anti-wiretapping statutes (18 U.S.C. §2510 et seq.). They were sentenced to consecutive terms of imprisonment toalling nine years each. Those sentences were imposed under 18 U.S.C. §4208(a)(2).[2] Upon appeal to this Court, those convictions were affirmed. See United States v. McClean, 528 F.2d 1250 (2d Cir. 1976).

Even while the appeal was pending, Appellants began to cooperate with the Office of the United States Attorney for the Eastern District of New York. Their cooperation was full and included their testimony as Government witnesses in an important criminal trial.

Within the period prescribed by Rule 35 of the Federal Rules of Criminal Procedure, Appellants moved for a reduction of their sentences. The principal ground asserted by them in support of their motion was their extensive post-conviction

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2. That section is now 18 U.S.C. §4205(6)(1).

cooperation with the Government. Government counsel supported that motion and detailed to Judge Weinstein the extent of Appellants' cooperation. Judge Weinstein granted Appellants' motion and drastically reduced their sentences from nine years to four years.

After Appellants began serving their sentence, they were rated by parole authorities pursuant to the Guidelines for release on parole promulgated by the United States Parole Commission. Each received a "salient factor" score of eleven — the highest possible score. The crimes for which they were sentenced were deemed to constitute "extortion" — crimes considered by the Guidelines as "very high" severity. According to the Guidelines, Appellants, having been sentenced to nine years in prison and eligible for parole at any time, would be likely to be paroled after having served from twenty-six to thirty-six months in prison. That same twenty-six to thirty-six month period applied to the reduced sentence of four years.

Appellants appeared before their local parole board and were advised that they would be released after approximately nine months. In November of 1976, the Parole Commission reversed the local board on the ground that the proposed release date was "outside the guidelines" (A11-12).

ARGUMENT

THE TRIAL COURT ERRED IN RULING THAT IT LACKED POWER TO ENTERTAIN APPELLANTS' MOTION

This appeal presents to this Court a most narrow issue with broad ramifications. The issue is a narrow one because it deals with the power of a district court to reconsider a previously-rendered decision on a timely-made motion to reudc[illegible] sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, where the court's intent in previously reducing the original sentence has been frustrated by the Parole Commission's adherence to its Guidelines. The ramifications are broad, since what is at stake here is whether the Parole Commission, by a rigid adherence to its Guidelines, can frustrate the clearly-expressed intention of a sentencing judge to reduce the time to be served by defendants whom he has sentenced.

Before setting forth our narrow argument, it may be helpful if we were to state what this case is not about — i.e., what we do not claim.

First, we do not argue that a Rule 35 motion to reduce a sentence may be made after the 120-day period has expired, even if the sentencing court's intent has been frustrated by the Parole Commission's adherence to its Guidelines. In such

a case, a motion may be made under 28 U.S.C. §2255. See, e.g.: Kortness v. United States, 514 F.2d 167 (8th Cir. 1975).

Second, we do not argue that a Rule 35 motion may be used as a vehicle to transform a sentencing court into a "super parole board" with power to review a decision of the Parole Commission to deny parole to a defendant previously sentenced by that court. See, e.g.: United States v. Salerno, 542 F.2d 628, 629 (3d Cir. 1976).

What we do say, however, is that where the intent of a sentencing judge in reducing a sentence is frustrated by the Parole Commission's rigid adherence to its Guidelines — an adherence which renders virtually inoperative the sentencing court's reduction of sentence — that court has the power to reconsider its prior action and reduce the sentence even further, so that its intent will not be frustrated.

Recent cases dealing with the Guidelines issued by the Parole Commission make it clear that a sentencing court has the power, either under Rule 35 or otherwise, to reduce its sentence when application of those Guidelines is likely to frustrate the court's original expectations as to parole release of the sentenced defendant. See, e.g.: Kortness v. United States, supra; United States v. Salerno, 538 F.2d 1005 (3d Cir. 1976); United States v. Somers (Ponzio), 20 Crim. L. Reptr. 2545 (3d Cir. Feb. 25, 1977).

It is true, of course, that some courts have limited the relief which the sentencing court is empowered to give by stating that the original sentence may be reduced only if it was imposed before the sentencing court was aware of the Guidelines and how they would affect the sentence it imposed. See, e.g.: United States v. White, 540 F.2d 409, 411 (8th Cir. 1976); Fields v. United States, 542 F.2d 472 (8th Cir. 1976). But these cases involved applications by prisoners under 28 U.S.C. §2255; they did not involve motions under Rule 35.

It is clear that the effect of the Guidelines and their possible frustration of a sentencing court's intent in imposing sentence has been used as a ground for the reduction of such a sentence under Rule 35. See, e.g.: United States v. Manderville, 396 F. Supp. 1244 (D. Conn. 1975); United States v. Wigoda, 417 F. Supp. 276 (N.D. Ill. 1976). Indeed, in United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975), this Court remanded a matter to the sentencing court for reconsideration of the sentence in light of the application of the Guidelines. It is also clear that, even absent a timely Rule 35 motion, similar relief may be granted, under certain circumstances, pursuant to 28 U.S.C. §2255. See, e.g., Kortness v. United States, supra.

Here, there was a timely Rule 35 motion based upon Appellants' extensive cooperation with the Government. The

motion was granted and a drastic reduction followed. We submit that it is obvious (and our claim to that effect was undenied below) that Judge Weinstein intended, by granting the motion and so drastically reducing the sentence, to work a commensurate reduction of the time which Appellants would actually have to serve. The local board, perhaps sensitive to Judge Weinstein's purpose, decided that Appellants should be paroled after nine months imprisonment. Acting solely upon the basis of its Guidelines, the Parole Commission in Washington reversed that decision.

By its action, the Parole Commission has frustrated Judge Weinstein's intentions. We submit that, when drastically reducing the sentences, Judge Weinstein did not know (and could not have known) that his reduction would, some months later, be rendered inoperative by the action of the Parole Commission. Under these limited circumstances, we submit that Judge Weinstein erred when he held that he lacked the power to reconsider his prior decision and to grant a further reduction so that his intent might be carried out. See, e.g., United States v. Hamilton, 391 F. Supp. 1090, 1093 (W.D. Mo. 1975), where it appears that a motion to reconsider a Rule 35 decision was deemed untimely not merely because it was filed beyond the 120-day period, but because the original motion was also so filed.

Conclusion

For the foregoing reasons, the order appealed from should be reversed and the matter remanded so that Appellants' motion may be decided on its merits.

Respectfully submitted,

Patrick M. Wall
36 West 44th Street
New York, New York 10036
(212) 986-6688

Counsel to Appellants

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA,

Appellee,

- v. -

JOHN McCLEAN and RAMON VIERA,

Appellants.

----------X

APPELLANTS' APPENDIX

Patrick M. Wall
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(212) 986-6688

Counsel to Appellants

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

74 Cr. 729 (JBW)

- against -

ORDER

JOHN McCLEAN and RAMON VIERA,

Defendants.

----------X

The above-named defendants having moved this Court, by a motion dated January 26, 1977, for reconsideration of its decision on their earlier motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of sentence and, after such reconsideration, for a further reduction in sentence, it is

ORDERED, that the motion be and it hereby is denied upon the ground that the Court lacks the power to entertain it.

Dated: Brooklyn, New York
January 31, 1977

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

- against -

74 Cr. 729 (JBW)

JOHN McCLEAN and RAMON VIERA,

NOTICE OF APPEAL

Defendants.

----------X

S I R S :

PLEASE TAKE NOTICE that the above-named defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the order of this Court dated January 31, 1977 denying their motion for reconsideration of this Court's decision on their earlier motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of sentence and, after such reconsideration, for a further reduction in sentence.

Dated: New York, New York
February 1, 1977

Yours, etc.,

Patrick M. Wall
36 West 44th Street
New York, New York 10036
(212) 986-6688

Counsel to Defendants

TO:

Hon. David G. Trager
United States Attorney for the
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

74 Cr. 729 (JBW)

- against -

NOTICE OF MOTION

JOHN McCLEAN and RAMON VIERA,

Defendants.

----------X

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Patrick M. Wall, sworn to January 26, 1977, and upon the annexed memorandum of law, the undersigned will move this Court, at a time to be selected by Hon. Jack B. Weinstein, for reconsideration of the decision on a previously-made motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction in sentence, and for a further reduction in sentence.

Dated: New York, New York
January 26, 1977

Yours, etc.,

Patrick M. Wall
36 West 44th Street
New York, New York 10036
(212) 986-6688

Counsel to Defendants

TO:
Hon. David G. Trager
United States Attorney for the
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

74 Cr. 729 (JBW)

- against -

AFFIDAVIT

JOHN McCLEAN and RAMON VIERA,

Defendants.

----------X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

PATRICK M. WALL, being duly sworn, deposes and says:

1. I am a Member of the Bar of the State of New York and of this Court, and maintain an office at 36 West 44th Street, New York, New York 10036. I represent the two above-named defendants, and make this affidavit in support of their motion for reconsideration of the prior reduction in sentence granted to them and for a further reduction in sentence.

2. On June 12, 1975, having been found guilty after a joint jury trial before Hon. Jack B. Weinstein, the defendants were sentenced to a total of nine years in prison for violations of 18 U.S.C. §§241, 242, 371 and 2511(1)(a).

3. Thereafter, each defendant cooperated with the United States Attorney's Office in connection with certain pending

investigations, and testified in the case of United States v. Frank King. On information and belief, former Assistant United States Attorney Thomas Puccio considers that cooperation to have been full and complete.

4. Thereafter, defendants made a timely motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of sentence. The reasons advanced by them in support of their motion were largely based upon their extensive cooperation with the Government after their conviction.

5. In June of 1976, Hon. Jack B. Weinstein granted the motion and reduced the sentence of each defendant to four years. The reduction was made after Judge Weinstein had been advised of the extensive cooperation given by the defendants to the Government. On information and belief, Judge Weinstein intended by his reduction of their sentence to reward them for their cooperation and, by example. to encourage others similarly situated to cooperate with the Government in a similar fashion.

6. Upon information and belief, by reducing their sentences from nine years to four years, Judge Weinstein intended to effect a commensurate decrease in the time each defendant would actually serve in prison.

7. The sentences imposed upon defendants were imposed under 18 U.S.C. §4205(b)(2), thus evidencing Judge Weinstein's

intent that the defendants be eligible for parole at any time.

8. Defendants surrendered to begin serving their sentences on or about June 30, 1976.

9. On information and belief, when the defendants met the local Parole Board in October of 1976, that Board, having considered all appropriate factors, determined that each should be released on parole on March 2, 1977.

10. On information and belief, in November of 1976, the Parole Commission in Washington, D.C., reversed the decision of the local Board on the ground that a release on March 2, 1977, would be outside the so-called "Guidelines" established by the United States Parole Commission for determining the time when various prisoners should be eligible for paroles. A copy of those "Guidelines" is annexed hereto as Exhibit A. A copy of the Parole Commission's decision with respect to defendant McClean is annexed hereto as Exhibit B. Upon information and belief, identical reasons were given by the Commission for its reversal of the local Board's determination as to defendant Viera.

11. As a result of the decision of the parole authority, defendants will not be eligible for parole until after they shall have served from twenty-six to thirty-six months of their sentences.

12. Upon information and belief, those "Guidelines"

would have called for the same release eligibility date under the original sentence of nine years. Thus, this Court's reduction of the sentence from nine years to four years has resulted in no real change in the defendants' actual sentence, because of the parole authorities' reliance upon the "Guidelines."

13. As a result of the reliance upon the "Guidelines," therefore, this Court's intention to reduce the time to be served by the defendants has been frustrated and the granting of the motion to reduce has, as a practical matter, been negated.

WHEREFORE, I respectfully request that this Court reconsider its prior reduction of the sentences herein and, upon reconsideration, further reduce those sentences.

_____
Patrick M. Wall

Sworn to before me this
26th day of January, 1977.

_____

(REV. 9/75) ADULT A8

(GUIDELINES FOR DECISION-MAKING, AVERAGE TOTAL TIME SERVED BEFORE RELEASE)
(INCLUDING JAIL TIME)

OFFENSE CHARACTERISTICS: SEVERITY OF OFFENSE BEHAVIOR (EXAMPLES)	OFFENDER CHARACTERISTICS: PAROLE PROGNOSIS (SALIENT FACTOR SCORE) VERY GOOD (11-9)	GOOD (8-6)	FAIR (5-4)	POOR (3-0)
LOW IMMIGRATION LAW VIOLATIONS.....) MINOR THEFT (INCLUDES LARCENY)..) AND SIMPLE POSSESSION OF.....) STOLEN PROPERTY LESS THAN.....) $1000.....) WALKAWAY.....)	6-10 MO.	8-12 MO.	10-14 MO.	12-16 MO.
LOW MODERATE ALCOHOL LAW VIOLATIONS.....) COUNTERFEIT CURRENCY (PASSING/..) POSSESSION (LESS THAN $1000)....) DRUGS: MARIJUANA, SIMPLE POS- SESSION (LESS THAN $500).....) FORGERY/FRAUD (LESS THAN $1000).) INCOME TAX EVASION (LESS THAN $10,000).....) SELECTIVE SERVICE ACT VIOLATIONS.....) THEFT FROM MAIL (LESS THAN $1000).....)	8-12 MO.	12-16 MO.	16-20 MO.	20-25 MO.
MODERATE BRIBERY OF PUBLIC OFFICIALS.....) COUNTERFEIT CURRENCY (PASSING...) POSSESSION $1000 TO $19,999)....) DRUGS: MARIJUANA, POSSESSION WITH INTENT TO DISTRIBUTE/SALE LESS THAN $5000.....) "SOFT DRUGS", POSSESSION WITH INTENT TO DISTRIBUTE/SALE (LESS THAN $500).....) EMBEZZLEMENT (LESS THAN $20,000.) EXPLOSIVES, POSSESSION/TRANS-...) PORTATION.....) FIREARMS ACT, POSSESSION/PUR- CHASE/SALE (SINGLE WEAPON(S), NOT SAWED-OFF SHOT GUN OR MACHINE GUN.....) INCOME TAX EVASION $10,000 TO $50,000.....) INTERSTATE TRANSPORTATION OF STOLEN/FORGED SECURITIES (LESS THAN $20,000).....)	12-16 MO.	16-20 MO.	20-24 MO.	24-30 MO.

(MODERATE CONTINUED ON NEXT PAGE)

A9

	12-16 MO.	16-20 MO.	20-24 MO.	24-30 MO.
MODERATE CONTINUED				
MAILING THREATENING COMMUNICATIONS				
MISPRISION OF FELONY				
RECEIVING OF STOLEN PROPERTY WITH INTENT TO RESELL (LESS THAN $20,000)				
SMUGGLING/TRANSPORTING OF ALIENS				
THEFT OF MOTOR VEHICLE (NOT MULTIPLE THEFT OR FOR RESALE				
THEFT/FORGERY/FRAUD ($1000 TO $19,999)				
HIGH				
X BURGLARY OR LARCENY (OTHER THAN EMBEZZLEMENT FROM BANK OR POST OFFICE)				
COUNTERFEIT CURRENCY (PASSING/ POSSESSION $20,000 TO $100,000				
COUNTERFEITING (MANUFACTURING)				
DRUGS: MARIJUANA, POSSESSION WITH INTENT TO DISTRIBUTE/ SALE ($5000 OR MORE)	(16-20)	20-26	26-32	32-38
"SOFT DRUGS", POSSESSION WITH INTENT TO DISTRIBUTE/SALE ($500 TO $5000)				
EMBEZZLEMENT ($20,000 TO $100,000)				
FIREARMS ACT, POSSESSION/ PURCHASE/SALE (SAWED-OFF SHOT GUN(S), MACHINE GUN(S), OR MULTIPLE WEAPONS)				
INTERSTATE TRANSPORTATION OF STOLEN/FORGED/SECURITIES ($20,000 TO $100,000)				
MANN ACT (NO FORCE-COMMERCIAL PURPOSES)				
ORGANIZED VEHICLE THEFT				
RECEIVING STOLEN PROPERTY ($20,000 TO $100,000)				
THEFT/FORGERY/FRAUD ($20,000 TO $100,000)				
VERY HIGH				
ROBBERY (WEAPONS OR THREAT)	(26-36)	36-45	45-55	55-65
DRUGS: "HARD DRUGS" (POSSESSION WITH INTENT TO DISTRIBUTE/SALE FOR PROFIT (NO PRIOR CONVICTIONS FOR SALE OF "HARD DRUGS")				
"SOFT DRUGS" POSSESSION WITH INTENT TO DISTRIBUTE/SALE (OVER $5000)				
X EXTORTION				
MANN ACT (FORCE)				
SEXUAL ACT (FORCE)				

BEST COPY AVAILABLE

GREATEST

AGGRAVATED FELONY (E.G. ROBBERY,)
SEXUAL ACT, AGGRAVATED ASSAULT))
WEAPON FIRED OR PERSONAL INJURY.)
AIRCRAFT HIJACKING.....)
DRUGS: "HARD DRUGS" (POSSESSION)
WITH INTENT TO DISTRIBUTE/SALE)
FOR PROFIT (PRIOR CONVICTION(S))
FOR SALE OF "HARD DRUGS").....)
ESPIONAGE.....)
EXPLOSIVES (DETONATION).....)
KIDNAPPING.....)
WILLFUL HOMICIDE.....)

A10

GREATER THAN ABOVE---HOWEVER, SPECIFIC RANGES ARE NOT GIVEN DUE TO THE LIMITED NUMBER OF CASES AND THE EXTREME VARIATIONS IN SEVERITY POSSIBLE WITHIN THE GUIDELINE CATEGORY.

NOTES

1. THESE GUIDELINES ARE PREDICATED UPON GOOD INSTITUTIONAL CONDUCT AND PROGRAM PERFORMANCE.
2. IF AN OFFENSE BEHAVIOR IS NOT LISTED ABOVE, THE PROPER CATEGORY MAY BE OBTAINED BY COMPARING THE SEVERITY OF THE OFFENSE BEHAVIOR WITH THOSE OF SIMILAR OFFENSE BEHAVIOR LISTED.
3. IF AN OFFENSE BEHAVIOR CAN BE CLASSIFIED UNDER MORE THAN ONE CATEGORY, THE MOST SERIOUS APPLICABLE CATEGORY IS TO BE USED.
4. IF AN OFFENSE BEHAVIOR INVOLVED MULTIPLE SEPARATE OFFENSES, THE SEVERITY LEVEL MAY BE INCREASED.
5. IF A CONTINUANCE IS TO BE GIVEN, ALLOW 90 DAYS (3 months) FOR RELEASE PROGRAM PROVISION.

"HARD DRUGS" INCLUDE HEROIN, COCAINE, MORPHINE, OR OTHER OPIATE DERIVITIVES AND SYNTHETIC OPIATE SUBSTITUTES.

Form 3.1m 11-7
(Rev May, 1976)

UNITED STATES DEPARTMENT OF JUSTICE
United States Parole Commission
Washington, D. C. 20537

RECEIVED
NOV 26 1976
Warden's Office
Federal Correctional Institution

All

Notice of Action

Name John McClean

Register Number 06306-155 *Institution* Seagoville

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Regular Review Hearing at One-third of Sentence. (Reasons for continuance or revocation) (Conditions or remarks)

Your offense behavior has been rated as very high severity because the behavior involved multiple separate offenses which were a part of an organized ongoing criminal enterprise that demonstrated an unusual degree of sophistication; a violation of public trust, and total losses amounted to more than $100,000. You have a salient factor score of 11. You have been in custody a total of 5 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented,

(continued on page two)

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this Notice was sent.

[redacted]

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Commissioner.

B. Decision of the National Commissioners when referred to them for reconsideration. Appeal may be made to the Regional Commissioner.

C. Decision of the Regional Commissioner. Appeal may be made to the National Appeals Board.

D. Decision of National Commissioners in cases where they assumed original jurisdiction. Appeal may be made to the entire Commission.

E. Decision of a Regional Commissioner relative to Parole condition or continuance under supervision. Appeal may be made to the National Appeals Board.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

(Date Notice sent) (Region) (NAB) (Nat. Dir) (Docket Clerk)

INMATE COPY

FPI LC 6-76 845C SETS 9471

UNITED STATES DEPARTMENT OF JUSTICE

United States Parole Commission

Washington, D. C. 20537

A12

NOV 26 1976

Notice of Action

Name John McClean

Register Number 06306-155 *Institution* Seagoville

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

PAGE TWO

(Reasons for continuance or revocation) (Conditions or remarks)

a decision outside the guidelines at this consideration is not found warranted.

Commission policy prohibits a continuance past one-third of your sentence at initial hearing. Therefore, your case has been scheduled for further consideration at one-third of your sentence.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Commissioner.

B. Decision of the National Commissioners when referred to them for reconsideration. Appeal may be made to the Regional Commissioner.

C. Decision of the Regional Commissioner. Appeal may be made to the National Appeals Board.

D. Decision of National Commissioners in cases where they assumed original jurisdiction. Appeal may be made to the entire Commission.

E. Decision of a Regional Commissioner relative to Parole condition or continuance under supervision. Appeal may be made to the National Appeals Board.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

November 22, 1976 (Date Notice sent) | National Commissioners (Region) (NAB) (Nat. Dir) | mab (Docket Clerk)

EXHIBIT B - Page 2

INMATE COPY

FPI LC 6:76 843C SETS 9471

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

- against - 74 Cr. 729 (JBW)

JOHN McCLEAN and RAMON VIERA,

Defendants.

----------X

MEMORANDUM OF LAW IN
SUPPORT OF THE MOTION

Since the issue here is one upon which this Court has already ruled during the earlier informal presentation of the motion, the purpose of this brief memorandum is not so much to persuade the Court as it is to clarify our position.

It is defendants' position that this motion to reconsider is a timely one. The original Rule 35 motion was filed within the appropriate period. In granting the motion and reducing the sentence drastically, this Court evidently intended to commensurately reduce the time which the defendants should actually serve in prison. We suggest that had this Court realized that the parole authorities would render totally ineffective the reduction from nine years to four years, it would have reduced the sentence even further. Since that was unknown at the time of the reduction, we

suggest that this Court has the power to reconsider that original timely motion and grant a further reduction.

On the merits of the motion itself, we submit that this Court should not permit its intent with respect to the appropriate sentence to be frustrated by the mechanical knee-jerk reliance of the Parole Commission upon its "Guidelines." That reliance caused the initial reduction of sentence — earned by the defendants through extensive cooperation with the Government — to become illusory.

In short, this Court has the power to and should further reduce the sentences imposed upon the defendants.

Respectfully submitted,

Patrick M. Wall
36 West 44th Street
New York, New York 10036
(212) 986-6688

Counsel to Defendants

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT
EAST. DIST. N.Y.
★ MAR 12 1977
TIME A.M.